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Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

October Term, 1972

No. 72-882

DIANA KEARNY POWELL,
*Petitioner,*

v.

SOUTH JERSEY NATIONAL BANK
(formerly First Camden National Bank and Trust Company),

and

CHURCH OF OUR LADY, STAR OF THE SEA,
CAPE MAY, NEW JERSEY,
*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY AND APPENDIX

DIANA KEARNY POWELL
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Washington, D. C. 20005
*Petitioner, pro se*

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IN THE

# Supreme Court of the United States

October Term, 1972

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**No.**

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DIANA KEARNY POWELL,

*Petitioner,*

v.

SOUTH JERSEY NATIONAL BANK
(formerly First Camden National Bank and Trust Company),

and

CHURCH OF OUR LADY, STAR OF THE SEA,
CAPE MAY, NEW JERSEY,

*Respondents.*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY AND APPENDIX

---

Petitioner Diana Kearny Powell respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of New Jersey entered in the above-entitled proceedings on September 19, 1972, finally dismissing review of judgment of partition.

## OPINIONS BELOW

Opinion of the Superior Court of New Jersey, Chancery Division, Cape May County, Docket No. C-1791-68, decided October 28, 1969, (A-1-10), has not been reported. Judgment of the Superior Court of New Jersey, Appellate Division, No. A-1180-69, decided October 15, 1970 (A 16-17), has not been reported.

## JURISDICTION

Judgment of the Supreme Court of New Jersey (Docket No. 7632 (A-109, Sept. Term, 1970)) dismissing the appeal was entered March 15, 1971 (A-21). Letter of opposing counsel Louis B. LeDuc, Esq., dated July 31, 1972 informed Petitioner that Dismissal had been entered without notice to any of the parties (A-20). *Nunc pro Tunc* Motion filed by Petitioner in the Supreme Court of New Jersey, Docket No. 7632, filed September 13, 1972, (A-22), was denied by Order M-49, September Term, 1972, filed September 19, 1972 (A-23). The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

## QUESTIONS PRESENTED

1. Whether the State Court of Appeals erred in upholding the decision of the State Court of first instance in assuming recognized errors of fact which occurred in a related Federal Court decision were without significance to the Federal and State decisions: that is, whether errors in status of parties and dates of death materially affecting the status of Petitioner as substituted remainderman, member of a class designated to take the property by will, and reducing her to a mere claimant as in partial intestacy

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and failure of the will as to her, so deprives her of property in violation of Amendments V and XIV of the Constitution that this Court should exercise its discretion in granting certiorari.

2. Whether this Court should exercise its discretion in granting certiorari where a State Court, relying on State precedents, has rendered an opinion in conflict with decisions of this Court and of Federal Courts of Appeal by sustaining the disposition of future vested rights to estates of remaindermen who died before termination of the preceding trust estate, and without ever having had possession in fee simple, as against members of the class of substituted remaindermen designated in the will who are in esse and capable of immediate possession at termination of the trust.

## STATUTES INVOLVED

The Constitution of the United States, Amendment V, which provides:

> "No person shall . . . be deprived of . . . property, without due process of law . . . ." U.S.C.A. Const. Amend. 14 §1.

and Amendment XIV which provides:

> ". . . [N]or shall any State deprive any person of . . . property, without due process of law . . . ." U.S.C.A. Const. Amend 14 §1.

## STATEMENT OF THE CASE

This case was instituted in the Superior Court of New Jersey, Chancery Division, by the First Camden National

Bank and Trust Company (now South Jersey National Bank), substituted Trustee of the estate of Lucy Powell, deceased, seeking an Order of Partition and sale of realty located at Cape May, New Jersey. Names as Defendants were present Petitioner, Diana Kearny Powell, and the Church of Our Lady, Star of the Sea, which is the contingent Remainderman under the will of Lucy Powell, other parties having defaulted. Petitioner claims fee simple title as only vested remainderman (substituted in the rights of her father who died May 11, 1955) under the will of her grandmother, also Diana Kearny Powell, who was in being and capable of taking the estate immediately upon the termination of the trust established under her grandmother's will. The trust was terminated by the death of Lucy Powell, the surviving trust beneficiary, on September 1, 1958. Lucy Powell, was the last of the testatrix's five children, including petitioner's father, named as remaindermen. None, except Petitioner's father, left children to be substituted in their rights as remaindermen under the terms of the will, leaving Petitioner the only vested remainderman, named or substituted, in being. The claim of the Lucy Powell estate to a substantial portion of the remainder interest of the Diana Kearny Powell estate rests on the precedent of several New Jersey cases, but claims directly under the ruling in *Powell v. National Savings and Trust Co. et al.*, 111 U.S. App. D.C. 290, 296 F.2d 412.[1] The New Jersey Chancery Division noted a number of factual errors in the District of Columbia decision, but claimed they were irrelevant (A-6), on the

[1] *Powell v. National Savings and Trust Co., et al.*, 111 U.S. App. D.C. 290, 296 F.2d 412, *cert. den.*, 368 U.S. 946, 7 L. Ed. 2d 343, 82 S. Ct. 387 (1961), *rehrg. den.*, 368 U.S. 1005, 7 L. Ed. 2d 547, 82 S. Ct. 547 (1962), 114 U.S. App. D.C. 296, 314 F.2d 274 (1963), 379 U.S. 920 (1964), *rehrg. den.*, 379 U.S. 984 (1965), 384 U.S. 938, *rehrg. den.*, 384 U.S. 1027, 86 S. Ct. 1019 (1966), 390 U.S. 957, *rehrg. den.*, 390 U.S. 1037 (1969).

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premise that New Jersey precedents agreed with the District of Columbia decision. It held that notwithstanding the grant in fee to the Trustee in the Diana Kearny Powell will, the indefeasible estate in fee simple existed immediately in the named remaindermen, and could be defeated only if they died with surviving issue before termination of the trust. If a remainderman is childless, his heirs and devisees could defeat the remainder distribution under the will of another who had arranged to set up a trust, as an intermediate estate (A-7-9). The constitutional question of due process of law in violation of rights under Amendments V and XIV of the Constitution was first raised by Mr. LeDuc, counsel for the Estate of Lucy Powell at the trial in the Chancery Division, October 20, 1969, and was first raised by Petitioner Diana Kearny Powell by Motion for Reconsideration, filed November (10?) 1969, and continued through all stages thereafter. Appeal timely taken March 6, 1970, (A-15) to the Superior Court of New Jersey, Appellate Division, from Judgment for Partition, entered Jan. 30, 1970, (A-11-14), No. A-1180-69, was decided October 15, 1970, (A-16-17), sustaining the decision of the Chancery Division. Timely appeal, December 17, 1970 (A-18-19), was dismissed by Order entered March 15, 1971, Case No. A-109 September Term, 1970, Docket No. 7632, (A-21). No party was notified of this disposition until opposing counsel, Louis B. LeDuc, Esq., enquired and advised Petitioner by letter dated July 31, 1972 (A-20). *Nunc pro Tunc* Motion to Reopen filed by Petitioner in the Supreme Court of New Jersey, Docket No. 7632, on September 13, 1972, (A-22) was denied M-49, September Term, 1972, on September 19, 1972 (A-23). Application for sale of the property by Mr. LeDuc, counsel for the Estate of Lucy Powell, has been granted, after hearing September 15, 1972,

before Judge Herbert Horn, Petitioner Diana Kearny Powell being the only party present, and consenting to sale on condition that her rights and claims to distribution would not be jeopardized. Mr. LeDuc had died suddenly the evening before the hearing.

## REASONS FOR GRANTING THE WRIT

### I.

**DECISION OF STATE COURT WAS SWAYED BY FEDERAL COURT DECISION ON MISTAKEN SET OF FACTS MATERIALLY AFFECTING PETITIONER'S STATUS AS A SUBSTITUTED REMAINDERMAN. STATE COURT CANNOT ASSUME DECISION WOULD BE UNCHANGED BY MATERIAL ERRORS IN DATES AND STATUS OF PARTIES. A DECISION DEPRIVING PETITIONER OF PROPERTY ON THE ASSUMPTION OF A FALSE SET OF FACTS VIOLATES DUE PROCESS OF LAW GUARANTEED BY AMENDMENTS V AND XIV OF THE CONSTITUTION.**

The New Jersey Court had before it as prime evidence the Judgment of the United States Court of Appeals for the District of Columbia Circuit, *Powell v. National Savings and Trust Co., (supra,* p. 4), holding that the vested future rights to an estate in remainder were not terminated by the remainderman's death prior to termination of the preceding trust, but could be conveyed by will or descent even though the remainderman never had a present interest, and that this right was indefeasible, even by the will creating the remainder estate, unless the remainderman was survived by issue. The Court recognized material error in the Federal decision, citing error in the date of death of Petitioner's father, his status in the case, and other circumstances affecting her status as the only vested

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remainderman in being at termination of the trust, (A-6) albeit a substituted rather than named remainderman, errors which reduced Petitioner to the status of a mere claimant with rights inferior to those taking under the rights of those named remaindermen who had died without issue years before termination of the trust. Since this interpretation of a vested future interest corroborated State decisions, the Court followed this monstrous distortion of clear thinking as immaterial to the issue. However, without the error of fact, there would have been no real question of distribution, and the case would never have been presented to the New Jersey Court. Nor is the ruling as applied to the correct facts sustained by other Federal decisions.

Therefore, this Court should exercise its discretion to review on certiorari a decision made on the basis of known error, by which Petitioner is deprived of her vested remainder rights, in violation of the guaranty of due process under Amendments V and XIV.

## II.

### THE STATE COURT, ON THE BASIS OF STATE PRECEDENTS, HAS RULED IN A WAY IN CONFLICT WITH DECISIONS OF FEDERAL COURTS OF APPEALS AND OF THIS COURT.

The New Jersey Court, in formulating its ruling, cited State decisions as sustaining the indefeasible right of a remainderman holding a vested future interest, on the theory that his fee interest relates back to the original will, with only the present enjoyment postponed by the intervening trust (A-7-9). This would give the remainderman dying before termination of a trust greater rights than

the original testator in disposing of property the remainderman never held in possession, to unknown persons, at an unforseen and perhaps distant time in the future. This violates the decisions of this Court in *Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. Ed. 629, and in *Ochoa v. Hernandez*, 230 U.S. 139, 57 L. Ed. 1427, 33 S. Ct. 1033; as well as decisions of the Federal Courts of Appeal, notably *Jewell v. Graham*, 97 App. D.C. 391, 24 F.2d 257, *cer. den.*, 48 S. Ct. 559, 277 U.S. 596, 72 L. Ed. 1006, and *Pyne v. Pyne*, 81 U.S. App. D.C. 11, 154 F.2d 297. In the *Pyne* case, the Court specifically stated the vested remainderman could not dispose of what he did not have, holding:

> ". . . As the District Court held that John Pyne's interests were indefeasible, it follows that the decree must be reversed."

Since the decisions of the New Jersey State Courts are following the precedent, in conflict with the Federal Court decisions and in violation of rights to due process under Amendments V and XIV, it is submitted that this Court should exercise its discretion to review on writ of certiorari.

## CONCLUSION

For the foregoing reasons, and for the reasons substantially included therein, this petition for Writ of Certiorari should be granted.

Respectfully submitted,

DIANA KEARNY POWELL,

1500 Massachusetts Ave., N.W.
Washington, D. C. 20005
(223-0640)

*Petitioner pro se*

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# APPENDIX

(NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS)

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
CAPE MAY COUNTY
DOCKET C-1791-68

| | | |
|---|---|---|
| FIRST CAMDEN NATIONAL BANK AND TRUST COMPANY, Substituted Trustee under the Last Will and Testament of Lucy Powell, Deceased, | : | |
| Plaintiff, | : | |
| v. | : | O P I N I O N |
| DIANA KEARNEY POWELL, MILDA E. POWELL, EDDIA LAURENT POWELL and CHURCH OF OUR LADY, STAR OF THE SEA, CAPE MAY, N.J. | : | |
| Defendants. | : | |

Decided October 28, 1969.

Mr. Louis B. Le Duc for Plaintiff

Diana Kearny Powell, pro se

Mr Martin F. Mc Kernan for Defendant Church of Our Lady, Star of the Sea, Cape May, N.J.

HORN, J. S. C.

Plaintiff, whose name has been officially changed since the institution of this action to South Jersey National Bank, filed its complaint as substituted trustee under the last will and testament of Lucy Powell, deceased, in order to effect a partition of a tract of land generally identified as 824 Stockton Avenue, in the City of Cape May, New Jersey.

The facts are not in dispute. The primary issue is whether plaintiff, as trustee, is a co-owner of the land so that

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it has standing to ask for partition. Defendant Diana Kearny Powell (hereinafter referred to as Defendant unless otherwise indicated) suggests that it does not, and that she is the sole owner of the premises.

The controversy stems from the terms of a will made by Miss Powell's grandmother, Diana Kearny Powell (Powell), who died November 30, 1904, a citizen and resident of the District of Columbia.

Her will, made in 1895, devised real estate and personal property to her son, William Glasgow Powell, as trustee in and for the following trusts, viz:

> "Fourth: All the rest and residue of my estate, real, personal and mixed, of whatsoever kind and description and wheresoever situate, of which I now am or at the time of my death may be seized or possessed, I give, devise and bequeath unto my said son William Glasgow Powell, and his heirs forever, in and for the following trusts, viz:
>
> first, to collect and reduce into money all the personalty and the same to safely invest, and from such investment and from the realty hereby devised, to collect the profits, income and rents, and after deducting and paying therefrom all costs and charges, necessary for the preservation of the property, including taxes, levies, assessments, insurance and repairs, and his own proper expenses and commissions, secondly, to pay the net residue in equal parts, semi-annually, to my two daughters, Alice Elizabeth Powell and Lucy Powell, to each one-half, until the marriage or death of either, whichever event shall first happen: and thirdly, upon the marriage or death of one of my said daughters, then and thereafter to pay the whole of said net income, semi-annually, to the other daughter, if alive and unmarried, and upon the marriage or death of both daughters, then fourthly and finally to divide the said property absolutely and in fee, either in kind or by sale or conversion into money, equally between my children now living, viz: the said William Glasgow Powell, Owen Bullitt Powell, George Cuthbert Powell, the said Alice Elizabeth Powell and the said Lucy Powell, the

descendants of any who may die before the time of division hereinbefore fixed, to have and take the share of their deceased parents, it being my intention that my said daughters shall have the whole of said net income in equal shares so long as they live and are unmarried, and upon the marriage or death of one, the whole shall then be paid to the other until her marriage or death, when the entire property is to be equally divided among my children, and the descendents of any deceased child or children, as hereinbefore specified."

Defendant is the sole surviving child of William Glasgow Powell, the trustee named in the will. Defendant Milda E. Powell is the widow of Owen Bullitt Powell, who died in 1936. Defendant Emilie Lampert Powell is the widow of William Glasgow Powell, who died May 11, 1955. Defendant Church of Our Lady, Star of the Sea, Cape May, N. J., is a devisee under the will of Lucy Powell who died September 1, 1958, the last survivor of testatrix's five children. Defendant's father, William Glasgow Powell, died three years before Lucy Powell, on May 11, 1955.

Following the death of William Glasgow Powell, National Savings and Trust Company, a banking corporation of the District of Columbia, was duly appointed by a court in that jurisdiction as substituted trustee of the Powell estate. Plaintiff became substituted trustee of the estate of Lucy Powell in 1964. In 1968, pursuant to a direction of the United States District Court of the District of Columbia, the National Savings and Trust Company executed a deed purporting to convey the following interests in the Cape May premises, to wit: to defendant Diana Kearny Powell 1/5th; to Milda E. Powell 1/5th; to Amelia Lampert Powell 1/10th; and to plaintiff 1/2. Up until this transfer plaintiff did not know and had no cause for knowing that the Lucy Powell estate

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allegedly owned an interest in the premises. After it learned of the alleged interest in the trust estate, it ordered an inspection of the premises to be made and found them to be in a vacant and dilapidated condition. Thereafter it caused an appraisal to be made which showed a value of $6,500 for the land and building.

It is undisputed that the premises are in sad need of repair and produce no income.

Fiduciaries may sell property which produces insufficient income, N.J.S.A.3A:16-15; Simon v. Simon, 137 N.J. Eq. 46) (Ch. 1946), but to sustain an action for the partition of real estate, one must establish that he has some interest in the title, whether legal or equitable. Hanson v. Levy, 141 N.J. Eq. 103 (Ch. 1947).

After the death of Lucy, a question arose as to whether her estate was entitled to a share in the corpus of the trust fund established under the will and codicil of Diana Kearny Powell, deceased, and this, of course, included the question of whether her estate owned any titular interest in the premises in question.

On August 31, 1959, defendant moved before the United States District Court in the District of Columbia to compe distribution to herself of the corpus of the trust estate created under the will of her grandmother, Diana Kearny Powell. The corpus included the Cape May property which is the subject of the instant action. This precipitated a motion by the successor

trustee of the estate of said grandmother to add other interested parties to the litigation, and to seek instructions of the court with respect to distribution of the trust estate.

As the result of crossmotions for summary judgment made by defendant and others and National Savings and Trust Company, Successor-Trustee, the late United States District Court Judge Holtzoff entered a judgment on October 5, 1960, which in part held as follows:

> "3. That the will of Diana Kearny Powell, deceased, is construed as providing that each of the five remaindermen designated therein, namely, William Glasgow Powell, Owen Bullett Powell, George Cuthbert Powell, Aimee Powell and Lucy Powell, received a vested remainder in one-fifth of said estate subject to being divested only by his or her death leaving descendants surviving prior to the time of distribution set forth in said will, and accordingly that as to each of said remaindermen who died prior to the time of distribution leaving no surviving descendants his or her remainder interest was not divested and now is distributable to his or her successors in interest."

Defendant appealed from this judgment to the United States Court of Appeals, District of Columbia Circuit, on October 13, 1960. The appeal was argued before Chief Judge Wilbur K. Miller and Judges E. Barrett Prettyman and Warren E. Burger. Circuit Judge Burger (now Chief Justice of the United States) wrote the majority opinion, Judge Prettyman dissenting. It affirmed the judgment entered by Judge Holtzoff. Judge Burger's opinion in part stated: "that the will discloses an intent to vest each of the five children with an equal share of the residue 'absolutely and in fee', subject only to the life estates of the daughters on the terms described and subject to

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being divested only if they predeceased the life tenants and were survived by issue." Powell v. National Savings and Trust Co., 296 F.2d 412 (1961), cert. den. 368 U.S. 496 (1961); rehearing den. 369 U.S. 1005 (1962); 314 F.2d 274 (1963); 379 U.S. 920 (1964); rehearing den. 379 U.S. 984 (1965); 384 U.S. 938,1027 (1966); 390 U.S. 957,1037 (1968). The latest petition for certiorari was rejected by the United States Supreme Court on October 13, 1969.

Defendant's brief asserts that the federal court decisions were obtained as the result of collusion between the respective attorneys for the Powell estate and the Lucy Powell estate in deceiving "the Court as to the terms of the will of Diana Kearny Powell, deceased, the facts, the record, and the cited authorities."

I have considered the errors which defendant urges were apparent on the record and which in fact brought about the affirming opinion of the Court of Appeals. I agree that there are several errors in the factual statements, (for example, reference is made to five life tenants instead of two: reference is made to defendant's father William Glasgow Powell as the survivor of the five children when in fact Lucy was the survivor, he having died approximately three years earlier) but, in my opinion, these errors do not affect the legal conclusions. These are based on legal precedents as well as the apparent intent of Powell as gleaned from the terms of the will. Obviously if the correct factual statements were considered, the holding would have been the same.

This court does not sit as an appellate court to review judgments of federal courts. In any event, as will be observed, we make our independent conclusions.

Although it would seem that the federal courts should have attempted to construe the will insofar as the real estate is concerned on the basis of the law of New Jersey, the *locus rei sitae*, this was not done. Hart v. Orcutt (not officially reported) 59 A. 2d 17 (Ch. 1949), rev'd other grds. 1 N.J. 454 (1949); Krubel Realty Corp. v. Krubel, 138 N.J. Eq. 466 (Ch. 1946); 95 C.J.S. "Wills", Sect. 677, p. 718; 36 C.J.S. "Federal Courts" Sect. 189(5), page 480.

The doctrine of collateral estoppel might be applicable to the facts in this case, since the issues in the action determined by the federal courts and in the case at bar are essentially the same, and defendant Diana Kearny Powell had full opportunity to participate and actually participated in the trial of both cases. Robinson-Shore Development Co. v. Gallagher, 26 N.J. 59 (1958); Berger v. Local [illegible], 94 N.J. Super. 554 (Ch. Div. 1967); 50 C.J.S. "Judgments", Sect. 900, pp. 535-537 (1947).

Regardless of whether the doctrine of collateral estoppel is applicable, it would appear that the law of New Jersey is the same in the construction of this will as the law applied by the federal courts in Powell v. National Savings and Trust Co., *supra*.

The policy of the law requires that legacies and

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devises in all cases, unless clearly inconsistent with the intention of the testator, should be held to be vested rather than contingent. Cornwell v. Moore, 6 N.J. Super. 84 (App. Div. 1950); 6 N.J. Practice (Clapp, Wills and Administration, 3 ed. Sect. 572, pp. 86-87 (1962).

A vested remainder is defined as one to which there is a present fixed right to future enjoyment of property, though that enjoyment be postponed until the expiration of a prior estate. A contingent remainder, on the other hand, is one in which the person to take is not in esse or ascertained, or the event upon which enjoyment is to take place is uncertain, or both. It is the uncertainty of the right of enjoyment, and not the uncertainty of actual enjoyment, that renders a remainder contingent.

It has become the settled rule that a devise of a remainder limited upon a particular precedent estate, determinable on an event which must necessarily happen, will be construed as vesting the remainder estate at the time of the death of the testator, unless his will clearly indicates a contrary intention. Cody v. Fitzgerald, 2 N.J. 93 (1949).

Thus, future interest given upon events certain to happen have also been held vested, including an interest "upon the death or marriage" of a living person, The Trenton Trust and Safe Deposit Co. v. Armstrong, 79 N.J. Eq. 572 (Ch. 1925), and an interest given "upon the death of the last survivor" of living persons. 6 Clapp, supra, at section 572, page 87.

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As stated by Judge Clapp:

"The question whether or not an interest is vested turns on the terms of the will. However, in the usual case the testator does not express himself upon the matter except in the most casual and, probably thoughtless, fashion. In order to resolve such doubts as are raised by the will, the law has settled itself into certain rules or presumptions * * *." 6 Clapp, supra, section 573, page 88.

In Redmond v. Gummere, 94 N.J. Eq. 216 (E. & A. 1922) the court dealt with a will which contained a clause strikingly similar to that in the Powell will. This clause provided for trustees to pay the net income to two daughters of the testatrix for their joint use as long as they remained living and unmarried, and to the survivor of them so long as she remained unmarried, for her sole use. Upon the death or marriage of the survivor "to pay over and divide the proceeds of such sale among my children, Maria M. Parker, Barker Gummere, Charles J. Gummere, Anna M. Gummere and Ellen E. Gummere, in equal shares, in all cases the children of a deceased parent to receive said parent's share."

The court there held that since the divesting was to occur only in favor of children of a remainderman predeceasing the distribution period, there was no divesting in the case of a remainderman dying without children, and in such case the vested share or interest passed to the personal representative of the one so dying.

I do not believe that the differences in language in the two clauses are such as to indicate that the rule of Redmond is not applicable in the construction of the will of testatrix in the case at bar. See also Post v. Herbert's Executors,

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27 N.J.Eq. 549 (E. & A. 1876); Peterson v. Ewald, 22 N.J. Super. 469 (App. Div. 1952); Kwitchair Nat. Bk. & Tr. Co. v. Seton Hall Col. of Nat., 76 N.J. Super. 423 (App. Div. 1967).

It is, of course, recognized that the polestar of the construction of any will is to ascertain the intention of the testator. In re Cook, 44 N.J. 1 (1965). However, in the light of the language used and the interpretation of same under rules of construction recognized for so many years in our own State, it is my belief that the intention of the testatrix, Diana Kearny Powell, was that each of her children was to take a vested interest in the real estate subject only to being divested if they predeceased the life tenants and were survived by children.

It would appear that by using the word "descendants" testatrix meant children or grandchildren. See Redcard v. New Jersey Historical Society, 132 N.J. Eq. 404 (E. & A. 1942).

Accordingly I find that title to the premises vested in accordance with the deed of conveyance made in 1960 by the National Savings and Trust Company.

Defendant Diana Kearny Powell further seeks to surcharge plaintiff on the ground that it breached its obligation as trustee with respect to the care and conservation of the premises in question. The evidence does not support this contention.

Judgment for partition will be entered and all counterclaims and crossclaims will be dismissed.

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Louis B. LeDuc,
1230 Wilson Building
Camden, New Jersey 08102
609-20-4-6480
Attorney of Plaintiff

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
CAPE MAY COUNTY
DOCKET NO. C-1791-68

| | | |
|---|---|---|
| FIRST CAMDEN NATIONAL BANK AND TRUST COMPANY, Substituted Trustee under the Last Will and Testament of Lucy Powell, Deceased, | : | Civil Action |
| Plaintiff, | : | JUDGMENT FOR PARTITION, ETC. |
| - vs - | : | |
| DIANA KEARNY POWELL, MILDA E. POWELL, EMILIA LINDERT POWELL and CHURCH OF OUR LADY, STAR OF THE SEA, CAPE MAY, N.J. | : | |

This action coming on to be heard on October 20, 1969, in the presence of Louis B. LeDuc, Attorney of the Plaintiff, and of defendant Diana Kearny Powell, appearing pro se, and of Martin F. McKernan, appearing for defendant Church of Our Lady, Star of the Sea, Cape May, New Jersey; and default having been entered against the other defendants herein; and it appearing that the plaintiff is entitled to the relief demanded in the complaint, and that the land and premises described in such complaint is not susceptible to physical partition, and the same being in a state of decay, unoccupied and yielding no income, should be sold for the best price obtainable; and the interests of the said parties in said premises being as hereinafter set forth:

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It is on this 30th day of January, 1970, Adjudged that the parties to this suit, hereinafter named, are seized of and entitled to the following land and premises described in the complaint herein, with the appurtenances, viz: All that certain tract and parcel of land and premises situate in the City of Cape May, County of Cape May and State of New Jersey and more particularly described as follows:

> "Situate on the Southeasterly side of Stockton Avenue, at the distance of 132 feet 3 inches Southwestwardly from the Southwesterly side of Jefferson Street, containing in front or breadth on said Stockton Avenue 30 feet; and extending of that width in length or depth Southeastwardly between parallel lines at right angles with said Stockton Avenue, 120 feet."

"also being known as #624 Stockton Avenue, Cape May, New Jersey," and that their respective rights and interests therein are hereby ascertained, adjudged and declared to be as follows:

Plaintiff South Jersey National Bank, formerly operating under the name "First Camden National Bank and Trust Company," substituted trustee under the last Will and Testament and Codicil of Lucy Powell, deceased, is seized in fee of an undivided 1/2 part of said premises, held in trust for the residuary beneficiaries under the last Will and Testament and Codicil of Lucy Powell, deceased, viz: a life estate in said one-half interest to defendant Diana K. Powell, and at her death, to any surviving child or children of said defendant, and in the event that she should die without child or children surviving, then absolutely to defendant Church of Our Lady, Star of the Sea, in Cape May, New Jersey.

Defendant Diana Kearny Powell is seized in fee to an undivided 1/5 part of said premises.

Defendant Milda E. Powell is seized in fee to an undivided 1/5 part of said premises.

Defendant Amelia Lumpert Powell is seized in fee to an undivided 1/10th part of said premises.

And it is further Adjudged that partition be made of the said lands and premises among the said parties, according to their respective rights and interests therein, as hereinabove adjudged: And that the Sheriff of Cape May County is hereby commanded to sell, at public sale, the above-described lands and premises, following public advertisement of such sale; and that out of the net proceeds of such sale the following sums shall be paid, viz:

To Plaintiff South Jersey National Bank, the sum of $473.10, representing the costs and expenses of the plaintiff with regard to the maintenance of the above-described lands and premises, and

To Louis B. La Duc, Esq., the sum of $500 for legal services in this cause.

It is further Ordered that the surplus money, if any there be, be paid to the Superior Court of New Jersey, at Trenton, New Jersey, thereto abide the further order of this Court.

The application of defendant Church of Our Lady, Star of the Sea, Cape May, N.J., for allowance of a fee for the services of its attorney, Martin F. McKernan, in this cause is hereby denied.

The application by defendant Diana Kearny Powell, appearing pro se, for allowance of counsel fee and costs is similarly denied.

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It is further ordered that the said parties or any of them shall have leave to apply to this Court for further direction if the occasion should require.

S/ HERBERT HORN
J. S. C.

Approved as to form:

Martin F. McKernan,
Atty. of Defendant, Church of Our Lady, Star of the Sea, Cape May,

Diana Kearny Powell, pro se

S/ Louis B. Le Duc
Louis B. Le Duc,
Attorney of Plaintiff, First Camden Nat'l Bank & Trust Co.

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| | |
|---|---|
| Diana Kearny Powell<br>1500 Massachusetts Ave., N.W.<br>Washington, D. C. 20005<br>Appearing pro se | Superior Court Of New Jersey<br>Appellate Division<br>Cape May County<br>Docket No. A-1791-68 |
| | Civil Action |
| First Camden National Bank and Trust Company, substituted Trustee under the Last Will and Testament of Lucy Powell, Deceased,<br>**Plaintiff**<br>-vs-<br>DIANA KEARNY POWELL, Diana de Powell, Dalbia Kearny Powell, and Church of Our Lady, Star of the Sea, Cape May, N. J.<br>**Defendants** | NOTICE OF APPEAL |

To: Louis B. Lemuc, Esq., for Plaintiff First Camden National Bank and Trust Co., etc. 1200 Wilson Bldg., Camden, N.J. 08102

Martin F. Ackerman, Esq., for Defendant Church of Our Lady, Star of the Sea, Cape May, N.J., 115 North 6th St., Camden, N. J. 08102

Take Notice that the Defendant, Diana Kearny Powell in the above-entitled proceeding hereby applies to the Superior Court of New Jersey, Appellate Division, from that portion of the Memorandum Opinion and Decision decided October 28, 1969, by the Honorable [illegible] Smith, Jr.,

concerning on page 6 following recognition of factual errors in the opinion of the United States Court of Appeals for the District of Columbia Circuit with the words (line 22):

"...but, in my opinion, these errors do not affect the legal conclusion. ..."

and from the Judgment for Partition entered the 30th day of January, 1970, in its entirety.

Diana Kearny Powell

Diana Kearny Powell, Defendant Pro Se

March 6, 1970

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NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-1180-69

FIRST CAMDEN NATIONAL BANK AND TRUST COMPANY (now South Jersey National Bank), Substituted Trustee under the Last Will and Testament of Lucy Powell, Deceased,

Plaintiff-Respondent,

v.

DIANA KEARNY POWELL,

Defendant-Appellant,

and

DIANA KEARNY POWELL,

Cross-Claimant-Appellant,

v.

FIRST CAMDEN NATIONAL BANK AND TRUST COMPANY and CHURCH OF OUR LADY, STAR OF THE SEA, CAPE MAY, NEW JERSEY,

Cross-Claim-Defendants-Respondents.

Argued September 29, 1970 -- Decided OCT 15 1970

Before Judges Lewis, Matthews and Mintz.

On appeal from the Superior Court, Chancery Division, Cape May County.

Miss Diana Kearny Powell, appellant, argued the cause pro se.

Mr. Louis B. Le Duc argued the cause for respondent South Jersey National Bank.

Mr. Martin F. Mc Kernan argued the cause for respondent Church of Our Lady, Star of the Sea, Cape May, New Jersey.

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PER CURIAM.

This is a pro se appeal by defendant Diana Kearny Powell from a judgment of partition, entered by the Chancery Division, affecting property in Cape May County.

We have reviewed the record and the applicable law in light of the several contentions advanced by defendant-cross-claimant on her appeal. We find no validity to those contentions. Judge Horn wrote a studied opinion for the Chancery Division, and we affirm substantially for the reasons therein stated.

The judgment is affirmed. No costs.

A TRUE COPY
Mortimer [illegible]
Clerk

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iled December 17, 1970]

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-1160-69

| | |
|---|---|
| FIRST CAMDEN NATIONAL BANK AND TRUST COMPANY (now South Jersey National Bank), substituted trustee under the Last Will and Testament of Lucy Powell, Deceased, Plaintiff-Respondent, v. DIANA KEARNY POWELL, Defendant-Appellant, and DIANA KEARNY POWELL, Cross-Claimant-Appellant v. FIRST CAMDEN NATIONAL BANK AND TRUST COMPANY and CHURCH OF OUR LADY, Stack of Iron Bar, Cape May, New Jersey, Cross-Claim-Defendants-Respondents. | Civil Action<br>On Appeal from Final Judgment Superior Court of New Jersey, Chancery Division --<br>Sat Below:<br>Horn, J. S. C.<br>NOTICE OF APPEAL by:<br>DIANA KEARNY POWELL, 1900 Massachusetts Washington, D. C. |

To: Louis B. LeBus, Esq., for Plaintiff-Respondent First Camden National Bank and Trust Co., etc., 1200 Wilson Building, Camden, New Jersey 08102

Martin F. McKernan, Esq., for Defendant-Respondent Church of Our Lady, Star of the Sea, Cape May, N.J., 115 North 6th Street, Camden, New Jersey 08102

Take notice that Defendant-Appellant Diana Kearny Powell hereby appeals to the Supreme Court of New Jersey under Rule 2:2-1 (a) (1) and Rule 2:2-3 (a) of the Rules Governing the Courts of the State of New Jersey (1969 Revision), from final

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Judgment of the Appellate Division of the Superior Court of New Jersey decided October 15, 1970 by the Honorable Arthur S. Lewis, P. J. A. D., and the Honorable Judges Matthews and Kintz, affirming the judgment of the Chancery Division, rendered by the Honorable E. Horn, J. S. C., Chancery Division, and from the Order of the Appellate Division decided October 28, 1970, denying Petition for Rehearing and Recall filed October 26, 1970, in the above-entitled proceeding, and from the Judgment of partition in its entirety.

Diana Kearny Cowell, Defendant-Appellant pro se
1500 Massachusetts Ave., N.W.
Washington, D. C. 20005 202-223-0440

November 25, 1970

[CERTIFICATE OF SERVICE,
dated November 25, 1970]

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LAW OFFICES
WILSON BUILDING SUITE 1200
BROADWAY AT COOPER STREET
CAMDEN, NEW JERSEY 08102
609-964-6400

CHARLES A. WOLVERTON
(1888-1966)

LOUIS B LE DUC
S M GRETZKOWSKI, JR.
DONNELL E. WOLVERTON

July 31, 1972

Miss Diana Kearny Powell
1500 Massachusetts Avenue, N.W.
Washington, D. C. 20005

Re: First Camden National Bank and Trust Co.
vs. Diana Kearney Powell, Docket No. 7632
Supreme Court of New Jersey

Dear Miss Powell:

I have to advise you that on writing to the Clerk of the Supreme Court of New Jersey to inquire why that Court had not rendered a decision on your appeal and petition for certification, I received his response to the effect that Judgment of Dismissal of your appeal and petition was entered by the Court on March 15, 1971. A copy of the Court's Order is enclosed herewith.

I assume that you received no notice of this action. Please advise me if my assumption is incorrect.

There is evident here a lamentable negligence in the Clerk's Office.

Very sincerely,

Louis B. LeDuc

LBL:esl
cc: Martin F. McKernan, Esquire (With copy of Court's Orde

SUPREME COURT OF NEW JERSEY

A-109 September Term 1970.

FIRST CAMDEN NATION BANK AND TRUST CO.,

Plaintiff-Respondent,

v.

DIANA KEARNEY POWELL,

Defendant-Appellant.

It appearing to the Court that the subject matter of this appeal is not applicable as of right under the Rules of Court, it is Ordered that the appeal be dismissed.

It is further Ordered that, treating the brief as a petition for certification, it is denied.

Witness, the Honorable Joseph Weintraub, Chief Justice, at Trenton, this 15th day of March 1971.

Acting Clerk

FILED

MAR 15 1971

Clerk

[Filed September 13, 1972]

SUPREME COURT OF NEW JERSEY

Docket No. 7632

| | |
|---|---|
| FIRST CAMDEN National Bank & Trust Company (now South Jersey National Bank), Substituted Trustee under the Last Will & Testament of Lucy Powell, Deceased, | Civil Action |
| Plaintiff-Respondent, | On Appeal from Final Judgment of Superior Court of New Jersey, Appellate Division affirming Final Judgment of Chancery Division Docket No. [illegible] |
| v. | |
| DIANA KEARNY POWELL, | |
| Defendant-Appellant | Sat Below: |
| and | Lewis, P.J.A.D., Matthews, J.A.D., Hintz, J.A.D. |
| DIANA KEARNY POWELL, | and |
| Cross-Claimant-Appellant | Horn, J.S.C. |
| v. | |
| FIRST CAMDEN National Bank & Trust Company & Estate of Wm. Kay, also Of The Bar, Carl Kay, Esq. Counsel, | |
| Cross-Claim-Defendants-Respondents | |

NUNC PRO TUNC MOTION TO REOPEN CONSIDERATION OF CERTIFICATION

Petitioner-Appellant Diana Kearny Powell respectfully prays that this Motion be considered as a NUNC PRO TUNC petition for certification, on the ground of failure to conform to the provisions of Rule 2:12:10 of the Rules of this Court requiring service of the Order upon the parties or their attorneys, depriving Appellant of opportunity to take timely action, to protect her rights under the Constitution claimed in her Brief.

S/ Diana Kearny Powell

Diana Kearny Powell, Defendant-Appellant
1500 Massachusetts Ave., N.W.
Washington, D. C. 20005 [illegible]

[CERTIFICATE OF SERVICE]

BLURRED COPY

A TRUE COPY
Florence R. Peebe
ACTING CLERK

SUPREME COURT OF NEW JERSEY
M-49 September Term 1972

First Camden National Bank,
Plaintiff-Respondent,
vs.
Nina Kearny,
Defendant-Appellant.

This matter having been duly presented to the Court, it is Ordered that the motion for reconsideration is denied.

Witness, the Honorable Joseph Weintraub, Chief Justice, at Trenton, this 19th day of September, 1972.

FILED
Florence R. Peebe
Acting Clerk

Florence R. Peebe
Acting
Clerk

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